

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Real Estate Closing
Agent License and Notary Public
Commission of Donald Leverne Walthall

**ORDER GRANTING PARTIAL
SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Manuel J. Cervantes (ALJ) on a Motion of the Minnesota Department of Commerce (Department or DOC) for Summary Disposition, filed September 7, 2010. No response to the motion was received on behalf of Donald Leverne Walthall (Respondent). The motion record closed on September 21, 2010, when the period for filing a response lapsed.

Christopher M. Kaisershot, Assistant Attorney General, represents the Department. Bobby Joe Champion, Esq., represents the Respondent.

STATEMENT OF ISSUE

The issue in this case is whether the Department may subject Respondent to discipline and sanctions for violations of Minn. Stat. chs. 45 and 58, for conduct described in detail below.

Based upon all of the files, records, and proceedings herein, and for the reasons detailed in the Memorandum below,

IT IS HEREBY ORDERED THAT:

1. The Department's Motion for Summary Disposition is GRANTED to the extent that the Respondent is collaterally estopped from contesting the factual basis for imposing discipline arising out of his convictions for fraud, racketeering, and the imposition of a civil judgment.
2. The hearing in this matter, scheduled for Wednesday, October 27, 2010, is limited to addressing what sanctions are appropriate in accordance with the analysis set out in the Memorandum below.

Dated: October 8, 2010

s/Manuel J. Cervantes

MANUEL J. CERVANTES
Administrative Law Judge

MEMORANDUM

I. Jurisdiction

The Administrative Law Judge and the Commissioner of Commerce have jurisdiction pursuant to Minn. Stat. §§ 14.57, 45.027, subds. 6 and 7; 58.12, subd. 2; and 82.35, subd. 1.¹ Respondent was given notice of this matter and the Department of Commerce has complied with all relevant procedural requirements. The ALJ and the Commissioner have authority to consider the issues set out in the Notice and Order for Prehearing Conference filed May 20, 2010.

II. Contention of the Department

The Department has brought this action alleging that the Respondent has violated Minnesota law in a manner that subjects him to disciplinary action, including debarment from the real estate profession and/or the imposition of civil penalties.

In Count I of the Department's Notice and Order for Prehearing Conference, it states that the Respondent conspired with others and participated in a "straw borrower" mortgage fraud scheme involving numerous residential property transactions. Moreover, the Respondent received kickbacks and other economic benefits in conjunction with these transactions, while causing substantial economic harm to the public. Respondent pled guilty to Felony Racketeering for his participation in the scheme. Finally, Count I alleges that Respondent violated standards of conduct, engaged in fraudulent, coercive, deceptive, or dishonest acts, and otherwise engaged in acts that demonstrate untrustworthiness, financial irresponsibility, or incompetence.²

Count II states Respondent participated in false, deceptive, and misleading statements and representations concerning his intended residence, income, assets, and/or liabilities in residential loan transactions in conjunction with the purchase of a number of residences. Shortly after he purchased them, the Respondent "flipped" these properties by selling them at a substantial markup. Moreover, the Respondent received kickbacks and other economic benefits in conjunction with these transactions, while causing substantial economic harm to the public. In 2008, Respondent was convicted of eight counts of Felony Theft by Swindle based on these deceptive mortgage loan applications and fraudulent transactions. Finally, Count II alleges that Respondent violated standards of conduct, engaged in fraudulent, coercive, deceptive, or dishonest acts, and otherwise engaged in acts that demonstrate untrustworthiness, financial irresponsibility, or incompetence.³

¹ Statutes are cited to the 2008 Edition.

² Minn. Stat. §§ 45.027, subd. 7(a)(4); 58.12, subd. 1(b)(2)(iv), (v), and (vi); 58.13, subd. 1(19); 82.35, subd. 1(b), (f), and (h); and 359.12. See also, *Pomrenke v. Commissioner of Commerce*, 677 N.W.2d 85, 90-91 (Minn. Ct. App. 2004) (acts committed by a mortgage originator who is exempt from licensure requirement provide the commissioner with jurisdiction to impose civil penalties and bar that individual from the field.)

³ Minn. Stat. §§ 45.027, subd. 7(a)(4); 58.12, subd. 1(b)(2)(iv), (v), and (vi); 58.13, subd. 1(19); 82.35, subd. 1(b), (f), and (h); and 359.12. See also, *Pomrenke*, *supra*.

Count III states Respondent participated in false, deceptive, and misleading statements and representations concerning Cartlidge's intended residence, income, assets, and/or liabilities in conjunction with a second mortgage taken against the property. Respondent has failed to satisfy the money judgment obtained against him by the lender. Finally, Count III alleges that Respondent violated standards of conduct, engaged in fraudulent, coercive, deceptive, or dishonest acts, and otherwise engaged in acts that demonstrate untrustworthiness, financial irresponsibility, or incompetence.⁴

The Department contends that the conduct leading to Respondent's convictions on Felony Racketeering, Felony Theft by Swindle, and the entry of a civil monetary judgment against the Respondent constitute the same underlying conduct resulting in violations of a mortgage originator's professional standards and Minnesota law. Furthermore, the Department contends that the Respondent is collaterally estopped from denying the facts underlying his criminal convictions and civil monetary judgment.

Pursuant to the ALJ's Scheduling Order of July 12, 2010, replies to any dispositive motions were to be filed by September 21, 2010.⁵ The Respondent has not filed any reply to the Department's motion for summary disposition.

III. Background Summary

In 1998, the Legislature enacted the Minnesota Residential Originator and Servicer Licensing Act ("the Act"), legislation that regulates the practice of originating residential mortgages. Under the Act, residential mortgage originators (also known as mortgage brokers) must either be directly licensed by the Department or covered by a specific statutory exemption.⁶

The Act imposes upon those who are directly licensed, and those who are otherwise exempt from licensure, certain standards of professional conduct. These professional standards extend to matters that relate directly to residential mortgage origination and other volitional non-mortgage related acts.⁷

The Department seeks to impose administrative discipline on the Respondent for violations of statute and rule, "including debarment ... or the imposition of civil penalties."⁸ On May 20, 2010, the Department filed a Notice and Order for Prehearing Conference setting this matter on before the ALJ.

⁴ Minn. Stat. §§ 45.027, subd. 7(a)(4); 58.12, subd. 1(b)(2)(iv), (v), and (vi); 58.13, subd. 1(19); 82.35, subd. 1(b), (f), and (h); and 359.12. See also, *Pomrenke*, *supra*.

⁵ The original deadline of September 17, 2010 was modified by email, sent on September 8, 2010.

⁶ See, Minn. Stat. §§ 58.01 – 58.18.

⁷ See, Minn. Stat. § 58.12.

⁸ Notice and Order for Prehearing Conference at 1.

On September 7, 2010, the Department moved for summary disposition. No response was received from the Respondent by the deadline established for a reply. The ALJ is proceeding without a response from Respondent.

IV. Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.⁹ The Office of Administrative Hearings has generally followed the summary judgment standards developed by state and federal courts when considering motions for summary disposition.¹⁰ A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the outcome or result of the case.¹¹

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.¹² The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.¹³ The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.¹⁴

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.¹⁵ All doubts and factual inferences must be resolved against the moving party.¹⁶ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹⁷

V. Undisputed Facts

On December 22, 2004, the Department issued the Respondent a Real Estate Closer license. That license expired on June 30, 2008. Also, effective December 22,

⁹ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500, subp. K; Minn. R. Civ. P. 56.03.

¹⁰ See Minn. R. 1400.6600. Rules are cited to the 2009 Edition.

¹¹ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

¹² *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

¹³ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

¹⁴ *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

¹⁵ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

¹⁶ See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

¹⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

2004, the State granted Respondent a commission of Notary Public, which expired on February 1, 2009.¹⁸

At all times relevant to the issues set out in the Notice and Order for Prehearing Conference, Respondent owned and operated Universal Mortgage, Inc. (UMI), which had been licensed as a mortgage originator from January 10, 2003 through October 31, 2007. Respondent, individually, was not required to be licensed as a mortgage originator because he was employed by UMI as its branch owner, but he was still subject to all other provisions of Minn. Stat. ch. 58.¹⁹

Between June 2005 and November 2005, Respondent purchased eight residential real estate properties whereby he paid an inflated purchase price and received a “kickback” from the seller.²⁰ In order to make these purchases, the Respondent obtained loans by fraudulently misstating his financial condition. The fraudulent loans resulted in the theft of money equal to the amount of the respective loans. The loan total for the eight fraudulent purchases equaled \$1,357,000.²¹ Respondent received a kickback ranging from \$22,500 to \$44,000 on each purchase from the seller out of the loan proceeds.²² Shortly thereafter, Respondent resold (“flipped”) the properties at a further inflated price to a “straw borrower” as part of a mortgage fraud scheme.²³

On December 6, 2007, the Respondent was charged in Hennepin County District Court with one count of Felony Racketeering and 4 counts of Felony Theft by Swindle.²⁴ Count 1 of the complaint alleged that the Respondent, while associated with UMI, conspired with another

and intentionally conducted or participated in the affairs of the enterprise by participating in a pattern of criminal activity, namely, theft by swindle; and intentionally participated in a pattern of criminal activity and knowingly invested any proceeds derived from the conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise or in real property.²⁵

On August 19, 2008, the Respondent entered a plea of guilty to the Racketeering charge. The four remaining Theft by Swindle counts were dismissed.²⁶

¹⁸ M. Boyer Aff., Senior Investigator, Dept. of Commerce (Boyer Aff.), at 1. The Department has not presented any issues regarding the Notary Commission in this Motion.

¹⁹ *Id.*, at 2. See, Minn. Stat. §§ 58.04, subd. 1(b)(1) and 58.05, subd. 1.

²⁰ Kaisershot Aff., Ex. A., at 1-7.

²¹ *Id.*, at 6.

²² *Id.*, at 5.

²³ Boyer Aff., at 2.

²⁴ Kaisershot Aff., Hennepin County Criminal Complaint No. 27-CR-07-127154, Ex. A., at 5.

²⁵ *Id.*, at 12.

²⁶ *Id.*, Petition to Enter Plea of Guilty, executed by the Respondent on August 19, 2008, Ex. A., at 20-23.

On January 15, 2008, the Respondent was charged with eight counts of Felony Theft by Swindle.²⁷ Each count reflected a mortgage lending transaction that the Respondent was involved in, wherein the Respondent made false statements to obtain a mortgage loan. On July 16, 2008, the Respondent was tried before Hennepin County District Court Judge Mark Wernick on eight counts of Theft by Swindle over \$35,000. Respondent was convicted of all eight counts. Judge Wernick found that the Respondent received a payment, described as a “kickback,” ranging from \$12,500 to \$40,000 as part of each transaction.²⁸

In his Verdict and Memorandum, the judge identified the Respondent as being the buyer and loan officer on eight residential property transactions resulting in the nine felony convictions.²⁹ On November 3, 2008, the Respondent was sentenced on all convictions, specifically, on eight counts of Theft by Swindle and one count of Racketeering. The Respondent was committed to the Commissioner of Corrections for 74 months.³⁰

On July 27, 2007, Ollie Cartlidge purchased a residential property located in Buffalo, MN. On October 11, 2007, Community Pride Bank (CPB) advanced \$89,000 to Cartlidge in exchange for a promissory note and a second mortgage based on loan application materials prepared and submitted by the Respondent. Not unlike the eight other fraudulent purchases described above, the Cartlidge application materials contained false and misleading statements, including Cartlidge’s intended occupancy, income, and liabilities. Upon Cartlidge’s default on the second mortgage, CPB sued Cartlidge and the Respondent, among others, in district court. On May 22, 2009, the Wright County District Court entered a \$93,834 judgment against Cartlidge and the Respondent, jointly and severally, finding specifically that the Respondent participated in defrauding CPB.³¹ There is no evidence in this record indicating that Respondent has satisfied the civil monetary judgment.

VI. Analysis

As a mortgage originator exempt from licensure, the Respondent was obligated to adhere to the standards of the Act. Among these standards, Minn. Stat. § 58.12, subd. 1(a), states in pertinent part:

The commissioner may by order take any or all of the following actions:

- (1) bar a person from engaging in residential mortgage origination or servicing;

²⁷ *Id.*, Second Hennepin County Criminal Complaint No. 27-CR-08-2435, Ex. A, at 41-48. Four of the eight counts were identical to the counts that were dismissed in the first criminal complaint of December 6, 2007.

²⁸ *Id.*, Findings of Fact, Conclusion of Law, Verdict, and Memorandum of District Court, Ex. A, at 34.

²⁹ Ex. A., at 4-17.

³⁰ *Id.*, Hennepin County Register of Actions, Ex. A, at 3.

³¹ Boyer Aff., at 19; Ex. 59.

(2) deny, suspend, or revoke a residential mortgage originator or a servicer license;

(3) censure a licensee;

(4) impose a civil penalty as provided for in section 45.027, subdivision 6; or

(5) revoke an exemption or certificate of exemption.

(b) In order to take the action in paragraph (a), the commissioner must find:

(1) that the order is in the public interest; and

(2) that the residential mortgage originator, servicer, applicant, or other person, an officer, director, partner, employee, or agent or any person occupying a similar status or performing similar functions, or a person in control of the originator, servicer, applicant, or other person has:

(I) violated any provision of this chapter or rule or order under this chapter;

* * *

(iv) violated a standard of conduct or engaged in a fraudulent, coercive, deceptive, or dishonest act or practice, whether or not the act or practice involves the residential mortgage lending business;

(v) engaged in an act or practice, whether or not the act or practice involves the business of making a residential mortgage loan, that demonstrates untrustworthiness, financial irresponsibility, or incompetence;

(vi) pled guilty, with or without explicitly admitting guilt, pled nolo contendere, or been convicted of a felony, gross misdemeanor, or a misdemeanor involving moral turpitude.

To apply collateral estoppel, the current issue must be identical to one in a prior adjudication, where there is a final judgment on the merits. The estopped party must have been a party or in privity with a party to the prior adjudication. The estopped party must have been given a full and fair opportunity to be heard on the adjudicated issue.³² The issue on which estoppel is to be applied must have been necessary and essential to the prior adjudication.³³

³² *Ill. Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 531 (Minn. 2003).

³³ *Hauser v. Mealey*, 263 N.W.2d 803, 808 (Minn. 1978).

The Respondent was a party to the racketeering and theft by swindle criminal complaints. He voluntarily pled guilty to the racketeering charge on August 19, 2008.

The Respondent actively defended himself at trial against the eight counts of theft by swindle contained in the second criminal complaint. The burden of proof in the criminal proceeding, beyond a reasonable doubt, is higher than the burden of proof in this proceeding. The Respondent was afforded a full opportunity to defend himself and to present his case in that proceeding. On July 16, 2008, the State prevailed on all eight counts. The Respondent did not appeal his convictions and the judgment of conviction is final for purposes of collateral estoppel.

The professional standards of conduct applicable to mortgage originators require the Respondent to refrain from engaging in any acts or practices which demonstrate that he is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority granted by the Commissioner.³⁴ Respondent, as the mortgage broker, stood in a position of trust and confidence and bore a fiduciary relationship towards the lenders to whom he submitted fraudulent loan applications. The Respondent utilized his position as CEO of UMI to accomplish that acts of fraud described above.³⁵

The facts underlying the Respondent's convictions for racketeering and theft by swindle, referenced in Counts I and II above, constitute sufficient grounds to impose discipline under Minn. Stat. § 58.12, subd. 1(b)(2):

- (i) violation of any provision of this chapter,
* * *
- (iv) engaged in a fraudulent, coercive, deceptive, or dishonest act or practice, whether or not the act or practice involves the residential mortgage lending business, and
- (v) engaged in an act or practice, whether or not the act or practice involves the business of making a residential mortgage loan, that demonstrates untrustworthiness, financial irresponsibility, or incompetence).

The facts underlying the monetary judgment against the Respondent in the above-referenced Count III, above fall within all of the foregoing statutory provisions, except Minn. Stat. § 58.12, subd. 1(b)(2)(vi). The factual background of the monetary judgment and Respondent's criminal convictions falls squarely within the Act. The ALJ concludes that the Respondent's convictions of Felony Racketeering and Felony Theft by Swindle constitute violations Minn. Stat. § 58.12, subd. 1(a)(2)(vi), as they involve crimes of moral turpitude.³⁶

³⁴ Minn. Stat. §§ 45.027, subd. 7(a)(4).

³⁵ Ex. A., at 1-7.

³⁶ Moral turpitude is not defined in the statute, but Black's Law Dictionary, pp. 1008-09 (6th ed. 1990) (citations omitted), defines it as follows: The act of baseness, vileness, or depravity in private and social duties which man owes his fellow man, or to society in general, contrary to accepted and customary rule

Under the foregoing analysis, the Respondent is estopped from disputing the underlying facts of his convictions and civil monetary judgment. The Department need not prove any additional facts beyond the criminal convictions and the entry of the civil monetary judgment, in order to impose administrative discipline. The application of collateral estoppel would not work an injustice on Respondent in this case.³⁷ But these conclusions alone do not resolve all the issues in this proceeding. The Respondent was convicted of violations of Minnesota's criminal code, not the statutorily imposed standards on mortgage originators. To the extent there is a difference between the underlying conduct that formed the basis for a conviction and the standards for professional conduct; a Respondent is entitled to assert any available defenses and the opportunity to adduce evidence relating to that difference.³⁸

In this matter, however, there is no difference in the conduct for which sanctions against the Respondent are being sought, since the fraudulent conduct that formed the basis of the Respondent's convictions/monetary judgment is similarly prohibited by the mortgage originator professional standards.

There is a clear difference in the consequences, however, between the criminal conviction/civil judgment and this proceeding. The Respondent is entitled to make argument and introduce evidence regarding the mitigation of any proposed sanctions, including debarment and the amount of civil penalties ultimately imposed, since those issues were not specifically addressed by the Department in their request for summary disposition. The issue regarding the level of sanctions was not collaterally estopped by Respondent's convictions or judgment.³⁹

VII. Summary

The Respondent is subject to administrative discipline from the DOC because his conduct, both criminal and civil (regarding the Cartlidge transaction), violated the Act while he worked as a mortgage originator.

The Department has shown that the Respondent's convictions support the imposition of discipline under Minn. Stat. § 58.12.⁴⁰ The Respondent has not

of right and duty between man and man. Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others.

³⁷ *Johnson v. Consolidate Freightways, Inc.*, 420 N.W.2d 608, 613-14 (Minn. 1988).

³⁸ *ITMO the Disciplinary Hearing Relating to Michael Alan Kveene*, License No. 10639, OAH Docket No. 12-2402-10724-2 (ALJ Order Granting Partial Summary Disposition issued November 1, 1996) (relying on *ITMO the Matter of the Teaching License of Falgren*, 545 N.W.2d 901, 905-06 (Minn. 1996)).

³⁹ The Department asserted that no hearing was required regarding sanctions absent some demonstration of material facts regarding the sanctions to be imposed. Department Motion, at 9. There was no showing made by the Department that any particular sanction was appropriate, thus the matter must be set on for hearing to provide the Respondent an opportunity to offer any available mitigating factors. *Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996).

⁴⁰ See also, Minn. Stat. §§ 82.35, subd.1 and 359.12.

demonstrated that any genuine issue of material fact exists to dispute that discipline is appropriate.

The lack of material issues of fact only relates to the issues regarding the alleged violations. The Respondent will have the opportunity to present evidence regarding the propriety of the sanctions to be imposed for the violations, if he so desires. The hearing scheduled for Wednesday, October 27, 2010, is limited to providing the Respondent an opportunity to submit any mitigating factors to determine what sanctions are appropriate in light of the established violations of the Act.

M. J. C.